Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
BellSouth Emergency Petition for	)	WC Docket No. 04-245
Declaratory Rule and Preemption	)	
of State Action	)	

COMMENTS OF QWEST CORPORATION

Qwest Corporation ("Qwest") hereby submits its comments on the Emergency Petition for Declaratory Ruling and Preemption of State Action ("Petition"), filed July 1, 2004 by BellSouth Telecommunications, Inc. ("BellSouth").[1]

BellSouth requests a declaratory order from the Federal Communications Commission ("Commission") to the effect that state regulators may not set the prices for network elements that have been "unbundled" pursuant to Section 271(c)(2)(B) of the Telecommunications Act of 1996 ("1996 Act"). The predicate for the Petition is recent action by the Tennessee Regulatory Authority setting a state regulated price for "enterprise" switching offered by BellSouth under contract with competitive local exchange carriers ("CLECs"). Enterprise switching is not an unbundled network element and is made available by BellSouth on an unbundled basis consistent with Section 271(c)(2)(B)(vi) of the 1996 Act. BellSouth requests a declaration that network elements made available under Section 271(c)(2)(B) of the 1996 Act are subject to federal, not state, jurisdiction and that the Tennessee Regulatory Authority's action is an unlawful usurpation of federal authority.

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[1] *See*, *Public Notice*, *Pleading Cycle Established for Comments on BellSouth's Emergency Petition for Declaratory Ruling and Preemption of State Action*, DA 04-2028, WC Docket No. 04-245, rel. July 6, 2004.

States have no authority to set prices for services subject to the jurisdiction of the Commission, and network elements made available pursuant to Section 271(c)(2)(B) of the 1996 Act are quite clearly within the federal authority. This is true not only for the reasons spelled out by BellSouth in its Petition (*i.e.*, that only the Commission has the statutory authority to enforce the federal requirement that these elements be priced and offered reasonably in accordance with Sections 201 and 202 of the Communications Act), but because of the general federal authority over interstate services and facilities. Unbundled switching purchased by CLECs pursuant to Section 271(c)(2)(B)(vi) of the 1996 Act will quite clearly be used for both interstate and intrastate services, and state regulators may not lawfully (without lawful delegation pursuant to the Federal Act itself) set prices for interstate services. Moreover, because enterprise switching is a network element that has been removed from the purview of Section 251(c) of the 1996 Act by express Commission action declaring that it does not meet the "impairment test" of Section 251(d)(2), the offering and pricing of such switching is a matter entrusted by the 1996 Act entirely to the federal jurisdiction even if it is offered to carriers on a commercial basis without the regulatory compulsion of Section 271(c)(2)(B) of the 1996 Act.

Grant of the BellSouth Petition is accordingly a fairly routine proposition. State regulators cannot set the price for services within the federal jurisdiction without express authority to do so,[2] and the Commission should so rule expeditiously. However, taking care of the particular (and relatively simple) problem raised by the Tennessee Regulatory Authority will solve only one of the myriad of complex and vital jurisdictional issues that this Commission must resolve in the near future. Specifically, the Commission must determine, hopefully in the

[2] State authority to set prices (within the parameters of this Commission's rules) for unbundled network elements that meet the terms of the impairment test set forth in Section 251(d)(2) of the 1996 Act is an example of lawful state-delegated authority.

context of its soon-to-be-released *Notice of Proposed Rulemaking on Remand* from the decision of the Court of Appeals in *USTA v FCC*,[3] the following critical jurisdictional issues:

1. States have no authority to require unbundling of network elements that do not meet the statutory "impairment" test set forth in Section 251(d)(2) of the 1996 Act. A finding by the Commission that the impairment test has not been met in a particular circumstance establishes a conclusive presumption that states cannot order the network element to be unbundled -- under either federal or state law.
2. States have no authority to set the price for any network element that is not subject to a lawful impairment finding (*i.e.*, any network element that is not made available under Section 251(c) of the 1996 Act and is either (a) made available on an unbundled basis pursuant to Section 271(c)(2)(B) of the 1996 Act, or (b) made available as the result of market negotiations with another carrier and filed with the Commission under Section 211(a) of the Communications Act.)
3. States have no authority to require the filing of, or to claim approval or disapproval authority over, any agreements described in the previous paragraph 2.

In other words, as is well stated in the *Indiana Bell* decision cited by BellSouth,[4] states have only limited authority over network elements covered by the 1996 Act -- that limitation being that state power may be exercised only when expressly authorized by the 1996 Act itself. Once a network element does not meet the statutory impairment test, state regulatory authority over that element becomes minimal.

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[3] *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *pets. for cert. filed,* Nos. 04-12, *et al.* (U.S. Sup. Ct. June 30, 2004).

[4] *Indiana Bell Telephone Company, Inc. v. Indiana Utility Regulatory Commission,* 359 F.3d 493 (7th Cir. 2004).

Obviously the Commission should not attempt to address all of these important jurisdictional issues in the context of the limited factual situation raised by BellSouth in its Petition. However, it is equally imperative that the Commission not assume that the BellSouth issues represent the full panoply of jurisdictional issues that the Commission will need to address in the very near future.[5] Thus, the Commission should grant the BellSouth Petition forthwith, and be prepared to address the other jurisdictional issues raised by state efforts to regulate network elements that do not meet the impairment test in the forthcoming docket on remand from the Court of Appeals in the *USTA II* case.

Respectfully submitted,

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[5] We elaborate on some of the more significant of these issues in the memorandum attached as Attachment A hereto. The attached memorandum was also filed as an attachment to an ex parte presentation in CC Docket Nos. 01-338 and 96-98 on July 26, 2004.

ATTACHMENT A

ATTACHMENT A

Qwest
Spirit of Service

M E M O R A N D U M

DATE: July 26, 2004

RE: STATES DO NOT HAVE JURISDICTION OVER RBOC CONTRACTS WITH CLECs FOR FUNCTIONS AND FACILITIES THAT HAVE BEEN DETERMINED DO NOT MEET THE "IMPAIRMENT TEST" FOR UNBUNDLED NETWORK ELEMENTS UNDER THE COMMUNICATIONS ACT

The purpose of this memorandum is to explain why commercial agreements between ILECs, especially RBOCs, and CLECs for access to network elements that have not been determined to have met the statutory "impairment" standard for unbundling under Section 251(d)(2)(B) of the Telecommunications Act of 1996 ("1996 Act"), are not subject to the jurisdiction of state regulatory agencies.[1]

I. BACKGROUND AND INTRODUCTION

Following the decision of the United States Court of Appeals for the D.C. Circuit in *USTA v. FCC*,[2] at the urging of all five of the FCC's commissioners, Qwest Corporation[3] commenced negotiations with various CLECs for the purpose of entering into commercially reasonable

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[1] This memorandum focuses on state authority over commercial agreements for such non-Section 251 network elements. The memorandum does not address the related issue of state commission authority under state law to require the unbundling of network elements that the Federal Communications Commission's ("FCC" or "Commission") Section 251 rules do not require to be unbundled. Rather, we assume here the validity of the position that only the FCC has the authority to determine that a particular network element be unbundled under Section 251(c) of the 1996 Act. To the extent necessary, we will further address the fact that states are absolutely precluded from ordering the unbundling of network elements.

[2] *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *vacating in part and remanding in part*, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978 (2003) ("*Triennial Review Order*").

[3] Qwest Corporation ("QC") is an ILEC and an RBOC (as the successor to U S WEST Communications, Inc., which was formed from three BOCs that were divested from AT&T on January 1, 1984). It is affiliated with Qwest Communications Corporation, an interexchange carrier and other non-ILEC interests. Unless otherwise specified in this memorandum, all references to QC and to Qwest are to Qwest Corporation, the Qwest ILEC.

agreements for the provision of unbundled switching, transport and high capacity loops -- network elements that do not meet the statutory "impairment test" for unbundling under the 1996 Act. Once such agreements are reached, it is Qwest's intention to file them with the FCC under Section 211(a) of the Communications Act, and two such agreements have already been concluded and filed.[4] They have been filed with the FCC on the basis that the agreements are not subject to the filing and review provisions of Sections 252(a) and (e) of the 1996 Act, and need not be filed with state regulators thereunder. Because the agreements are subject to exclusive federal jurisdiction, states are without independent authority to review them under state law.[5]

In *USTA II,* the Court of Appeals for the D.C. Circuit vacated the FCC's determinations that mass market switching, transport and high capacity loops were required to be made available as unbundled network elements under Section 251(c)(3) of the 1996 Act. The Court held that the FCC had not sufficiently supported the classification of these elements as UNEs under the statutory "impairment test" established in Section 251(d)(2)(B) of the 1996 Act. In addition, the FCC's decision that line sharing and a number of other network elements did not meet the impairment test was affirmed by the Court. Based on these decisions, Qwest commenced negotiations with various CLECs to attempt to reach commercially reasonable agreements for the provision of network elements that did not meet the "impairment test." In at least two instances (COVAD and MCI), actual agreements have been reached for network elements that are not required to be unbundled.

Qwest's position in these negotiations is very simple. While the coerced sale of Qwest's network functionality at below-cost rates cannot conceivably form the foundation of a competitive marketplace, Qwest and other ILECs have a significant economic incentive to actively seek and attract wholesale purchasers of network elements on terms and conditions that are mutually beneficial. The public interest is far better served if these agreements can be developed within a competitive market structure.[6]

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[4] 47 U.S.C. § 211(a). In fact, Qwest recently filed a commercial line sharing agreement and a commercial "platform" agreement with the FCC under Section 211(a). *See* letter from Craig J. Brown, Qwest, to Marlene H. Dortch, Secretary, FCC (May 25, 2004). Under this agreement, Qwest will make the "line sharing" network element available to COVAD at commercially reasonable rates, following the transition period in the *Triennial Review Order* for the phase-out of line sharing as an unbundled network element (or "UNE"). *See* letter from Craig J. Brown, Qwest, to Marlene H. Dortch, Secretary, FCC (July 19, 2004). Under this agreement Qwest offers the commercial Qwest Platform Plus service to MCI on terms and conditions that make economic sense to both parties.

[5] States have only limited review authority over negotiated agreements (47 U.S.C. § 252(e)(2)(A)). Qwest's position is that states do not possess even this limited authority over agreements that do not include network elements designated by the FCC for unbundling under Section 251(c) of the 1996 Act.

[6] *See* Emergency Petition for Declaratory Ruling, Preemption and for Standstill Order to Preserve the Viability of Commercial Negotiations, filed May 3, 2004 by SBC Communications, Inc., for a delineation of the public interest benefits of commercial negotiations for these elements, as opposed to regulation of the process by state regulatory authorities.

However, certain state regulators have been increasingly insistent that they have the authority to review and approve such commercial agreements. The issue was squarely presented by SBC on May 3, 2004, when it filed an "Emergency Petition for Declaratory Ruling, Preemption and for Standstill Order to Preserve the Viability of Commercial Negotiations." In that Petition, SBC alleged that at least several state regulators were actively seeking the filing of a commercial agreement that it had reached with a CLEC with the express intention of reviewing (and possibly modifying or disapproving) it. It has also been raised in the July 1, 2004 BellSouth Emergency Petition for Declaratory Ruling and Preemption of State Action, in which a specific assertion of jurisdiction by The Tennessee Regulatory Authority over the same type of commercial agreement has been challenged by BellSouth.[7] Qwest is faced with state regulators indicating the possibility that they will assert jurisdiction over the Qwest agreements with MCI and COVAD. As is demonstrated herein, state regulators have no such jurisdiction, and may not lawfully compel either SBC or BellSouth to take the action that is being demanded of them. Qwest is not required to file its commercial agreements with state regulators either (although we agree that they must be filed with the FCC under Section 211(a) of the Communications Act).

Qwest limits its analysis here to a special class of network elements -- those elements that have been specifically removed from the list of required UNEs by FCC or court action, so that the elements are not required to be offered under Sections 251(b) or (c) of the 1996 Act. For purposes of action in the immediate future, we include within this class four types of network elements – line sharing, mass market switching, certain high capacity (*i.e.*, DS1, DS3, and dark fiber) loops, and certain high capacity (*i.e.*, DS1, DS3, and dark fiber) transport -- that have been removed from the list of UNEs now that the mandate in *USTA II* has issued. Should agreements for other network elements that do not meet the impairment test be reached (*e.g.*, hybrid fiber loops), this analysis will apply to these items as well. We do not seek to extend the analysis in this memorandum beyond the scope of network elements actually examined by the FCC under the "impairment test." Because of their unique circumstances, mass market switching, high capacity loops and transport are included in this category. As line sharing was removed by the Commission itself, it is clear that it does not meet the "impairment test" under any analysis.

In addition, it is Qwest's intention that its commercial agreements and its interconnection agreements will be separate contracts. To the extent appropriate, Qwest's existing interconnection agreements will be amended to remove network elements that are no longer required to be offered as UNEs pursuant to the FCC's Section 251(b) and (c) unbundling rules, and these amendments will be filed with state regulators under Sections 252(a) and (e).[8] But Qwest's commercial agreements for non-Section 251(b) and (c) elements will not be a part of

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[7] The FCC has established a comment cycle for this petition. *See Pleading Cycle Established for Comments on BellSouth's Emergency Petition for Declaratory Ruling and Preemption of State Action*, DA 04-2028, WC Docket No. 04-245, rel. July 6, 2004.

[8] Obviously if a state attempted to undercut the federal regulatory structure by refusing to approve such an amendment it would be subject to preemption by the FCC as well as to reversal by an appropriate federal district court under Section 252(e)(6) of the 1996 Act.

Qwest's interconnection agreements, and will be filed with the FCC under Section 211(a) of the Communications Act.[9]

Finally, Qwest will comply with applicable federal rules regarding contracts between carriers. These rules include the filing of such agreements under Section 211(a) of the Communications Act and basic non-discrimination responsibilities. While it may be appropriate for the FCC to forbear from enforcing or continuing these rules with regard to this type of commercial agreement in the future, such action has not been taken at this time, and Qwest does not seek forbearance here.

Qwest's position is simple.

- State regulators have no jurisdiction under Sections 252(a) and (e) of the 1996 Act over agreements for network elements that do not meet the "impairment test" of Section 251(d)(2). This is because Sections 252(a) and (e) apply only to agreements for elements required to be made available under Sections 251(b) and (c) of the 1996 Act, and such elements (including line sharing, switching, high capacity loops and transport) are not being offered subject to these sections of the 1996 Act.[10] Unbundling of these elements is within the sole jurisdiction of the FCC.

- State regulators have no jurisdiction over agreements for these elements under their residual state jurisdiction because these elements are subject to FCC jurisdiction except where the 1996 Act has delegated power to the states.

- Filing of contracts for these elements is governed by Section 211(a) of the Communications Act -- which requires filing at the FCC, not at the states.

- For RBOCs, such as Qwest, the federal jurisdiction is made even more explicit because of the federal requirement that many of these network elements must be made available on an unbundled basis under Section 271(c)(2)(B) of the 1996 Act.

- To the extent that state regulators attempt to interfere with the offering of these elements (including attempting to assert a right to review, approve, disapprove or modify such an agreement), federal preemption is in order because it is necessary to protect the FCC's federal jurisdiction over these elements. In the case of network

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[9] Qwest is offering to combine network elements covered by commercial agreements with UNEs covered by interconnection agreements, even though it is not required to do so by the 1996 Act or the FCC's rules. *Triennial Review Order*, 18 FCC Rcd. at 17385-86 ¶ 655 n.1990. Qwest's commitment to combine these elements will be part of the commercial agreements, not the interconnection agreements that will be filed with the states under Sections 252(a) and (e).

[10] Because of the unique circumstances under which the industry labors in the wake of the *USTA II* decision, these network elements include switching, high capacity loops and transport, in addition to line sharing and other network elements specifically removed from the list of UNEs by action of the FCC.

elements that are not subject to a valid finding of "impairment," this preemption is automatic and does not need additional action by the FCC.

II. CONTRACTS FOR NETWORK ELEMENTS THAT HAVE NOT BEEN FOUND TO MEET THE STATUTORY "IMPAIRMENT STANDARD" ARE NOT SUBJECT TO STATE JURISDICTION UNDER SECTIONS 252(a) AND (e).

One of the specific regulatory powers vested in the states by the 1996 Act is the authority to review and approve "interconnection agreements" entered into under Sections 251 and 252 of the 1996 Act.[11] Agreements can be either voluntary or, if necessary, the result of state-conducted arbitrations.[12] The state's authority with regard to negotiated agreements is limited to approval or disapproval (on very limited grounds as specified in Section 252(e)(2)(A)) and enforcing the "opt-in" requirements of Section 252(i).[13]

However, not all agreements between carriers are subject to state filing and approval jurisdiction under Sections 252(a) and (e) of the 1996 Act. The relevant question is whether the agreement is an "interconnection agreement" for purposes of Sections 251(b) and (c) of the Act. Section 252(e) requires the filing and approval of "any interconnection agreement adopted by negotiation or arbitration." Section 252(a)(1) specifically references agreements "pursuant to section 251. . ." Agreements for network elements that are not required to be unbundled because of a ruling that they do not pass the "impairment test" are not "interconnection agreements" for purposes of Sections 252(a) and (e).

The term "interconnection agreement" is not defined in the 1996 Act. The Commission has defined the term as "any 'agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation. . .'"[14] The term "network element" is defined broadly in the 1996 Act as "a facility or equipment used in the provision of a

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[11] State approval is necessary for "any interconnection agreement adopted by negotiation or arbitration. . ." Section 252(a)(1) ("The agreement. . . shall be submitted to the State commission under subsection (e) of this section") and Section 252(e)(1) ("Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission.").

[12] 47 U.S.C. § 252(b).

[13] The FCC recently eliminated the "pick and choose" aspects of the opt-in requirements of Section 252(i) of the Act. *See In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, FCC 04-164, CC Docket No. 01-338, rel. July 13, 2004.

[14] *In the Matter of Qwest Corporation*; *Apparent Liability for Forfeiture*, 19 FCC Rcd. 5169, 5180-81 ¶ 22 (2004), citing *In the Matter of Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Agreements under Section 252(a)(1)*, 17 FCC Rcd. 19337, 19340-41 ¶ 8 (2002) ("*Declaratory Ruling Order*").

telecommunications service,"[15] but the term "unbundled network element" is not defined and is found only in Section 251(c) of the 1996 Act.[16] A "network element" includes almost any aspect of interconnection, while an "unbundled network element" includes only those designated elements that pass the statutory impairment test. The FCC has ruled that "only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed . . ." under Sections 252(a) and (e).[17] In other words, only agreements relating to *unbundled* network elements must be filed under Sections 252(a) and (e), not **all** agreements relating to network elements, and state jurisdiction is limited to those agreements covered by the Section 252(a) and (e) filing requirements. The determining factor in the case of a network element is whether the element is covered by the unbundling provisions of Section 251(c)(3) -- that is, whether the FCC has made a valid determination that it meets the statutory "impairment test" for unbundling under Section 251(d)(2)(B).

In this respect, the FCC has established a test for determining whether a network element is subject to the filing requirements of Sections 252(a) and (e). The 1996 Act grants state regulators the authority to demand the filing of a contract for a network element only if: 1) the element is classified properly as an "unbundled network element," and 2) the element fits within the confines of Sections 251(b) or (c). Network elements that have been examined by the FCC and have not been found to meet the statutory "impairment test" meet neither of these standards.

Section 251(b) deals with five specific obligations applicable to all LECs (including CLECs), and does not include any obligations regarding network elements, unbundled or not. Section 251(c) contains the mandatory requirements for the offering of "unbundled network elements" (which are subject to Section 252(e) filing), but does not apply by its terms to elements that have not been required to be unbundled based on a valid finding by the FCC (*i.e.*, elements that have been removed from Section 251(c)). The full relevant language of footnote 26 of the *Declaratory Ruling Order* makes this point clearly:

> We therefore disagree with the parties that advocate the filing of *all* agreements between an incumbent LEC and a requesting carrier. *See* Office of the New Mexico Attorney General and the Iowa Office of Consumer Advocate Comments at 5. Instead, we find that *only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under 252(a)(1)*.[18]

The filings in the proceeding leading up to the *Declaratory Ruling Order* are instructive in this respect. In 2002, Qwest had filed a declaratory ruling petition requesting a declaration that

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[15] 47 U.S.C. § 153(29).

[16] The independent unbundling requirements of Section 271(c) of the 1996 Act do not use the term "unbundled network element."

[17] *Declaratory Ruling Order*, 17 FCC Rcd. at 19341, n.26.

[18] *Id.* (emphasis added).

certain types of agreements did not need to be filed under Sections 252(a) or (e). Part of that petition noted that agreements for the purchase of network elements that did not need to be unbundled under Section 251(c) did not need to be filed under Sections 252(a) or 252(e), precisely the issue under consideration here:

> Nor do the Section 251/252 rules apply to network elements, such as local switching for large business customers in major metropolitan areas, that the FCC has concluded do not qualify for unbundling under the "necessary" and "impair" standards of Section 251(d)(2), nor to the transport and termination of non-local types of traffic, such as information access.[19]

The *Declaratory Ruling Order* treated the Qwest position on this issue as part of the Qwest request for a declaratory ruling.[20] The FCC never challenged the premise of the position -- that network elements not subject to mandatory unbundling were not subject to Sections 251(b) or (c) and that they were accordingly not subject to the filing requirements of Sections 252(a) and 252(e). In fact, in context, the statement in footnote 26 of the *Declaratory Ruling Order* that only Sections 251(b) and 251(c) services are covered by the Sections 252(a) and 252(e) filing requirements confirms Qwest's position that contracts for the sale of network elements not required to be unbundled under the "impairment test" do not need to be filed under those sections of the 1996 Act.[21]

Agreements between Qwest and CLECs for the provision of network elements that the Commission's rules do not require be unbundled based on a lawful application of the statutory impairment test are not interconnection agreements as that term is used in Sections 252(a) and 252(e) of the 1996 Act. Accordingly, they are not subject to state filing and approval rules under those sections of the 1996 Act.

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[19] Petition for Declaratory Ruling of Qwest Communications International Inc., WC Docket No. 02-89, filed Apr. 23, 2002, pp 36-37 (footnotes omitted). *And see* Qwest Reply Comments, WC Docket No. 02-89, filed June 20, 2002, pp 20-23.

[20] "According to Qwest, the following categories of incumbent LEC-competitive LEC arrangements should not be subject to section 252(a)(1): . . .(iii) agreements regarding matters not subject to sections 251 or 252 (*e.g.*, interstate access services, local retail services, intrastate long distance, and *network elements that have been removed from the national list of elements subject to mandatory unbundling).*" *Declaratory Ruling Order*, 17 FCC Rcd. at 19338-39 ¶ 3 (emphasis supplied).

[21] *See id.* at 19341, n.26.

III. EXCEPT AS PROVIDED IN SECTIONS 252(a) AND (e), AUTHORITY OVER CONTRACTS FOR NETWORK ELEMENTS THAT HAVE NOT BEEN FOUND TO MEET THE STATUTORY "IMPAIRMENT STANDARD" IS VESTED IN THE FCC, NOT THE STATES.

Network elements that do not meet the impairment test and are offered pursuant to contract to competing carriers are subject to federal law and federal jurisdiction under the Communications Act. In the case of network elements that meet the "impairment test" under the 1996 Act (*i.e.*, "unbundled" network elements), state regulatory agencies have been delegated certain limited authority to review such agreements. In the case of network elements that do not meet this test, the federal jurisdiction remains plenary and states have no authority to review any agreements pertaining to their offering. In other words, when a contract for a network element is no longer subject to the state's delegated authority under Sections 252(a) and (e) of the 1996 Act, regulatory authority over the element reverts almost entirely to the FCC, including leaving the FCC with the sole power to review and regulate contracts between carriers for such network elements.

Prior to the 1996 Act, states generally retained jurisdiction over intrastate telecommunications services and facilities except to the extent that the Communications Act specified otherwise or the FCC acted to preempt state jurisdiction based on state regulation interfering with the FCC's exercise of its own jurisdiction over interstate telecommunications. However, the 1996 Telecommunications Act changed that balance for matters addressed in the 1996 Act, vesting plenary power in the FCC, subject to specific "carve-outs" where states were delegated the authority to act. The sole basis for exercise of state authority to review agreements for network elements is delegation pursuant to the 1996 Act itself (or, possibly, lawful order of the FCC). States have been delegated authority to review "interconnection agreements" addressing matters covered by Sections 251(b) and (c) of the 1996 Act. States have not been delegated further authority to review agreements for other matters covered by the 1996 Act, including the network elements removed from the scope of Section 251(c).

States are delegated authority to review and approve "interconnection agreements" pursuant to Sections 252(a) and (b) of the 1996 Act. States are also delegated the authority to maintain and adopt state rules relating to telecommunications competition so long as they are "not inconsistent with [the 1996 Act] or the Commission's regulations to implement [the 1996 Act]."[22] These statutory *delegations* of authority to the states for those services and facilities covered by the 1996 Act are limited delegations, quite unlike the broad *reservation* of power to states for intrastate services covered by Section 2(b) of the Act.[23]

Agreements for these network elements (including switching, high capacity loops and transport) are subject to federal, not state, jurisdiction after having been removed from the federal list of

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[22] 47 U.S.C. §§ 261(b) and (c). *See also* 47 U.S.C. § 251(d)(3), pertaining to state interconnection regulations.

[23] 47 U.S.C. § 152(b). *See Indiana Bell Telephone Company v. McCarty*, 362 F.3d 378 (7th Cir. 2004).

unbundled network elements for three reasons: 1) In many cases, the elements are required under federal law to be provided on an unbundled basis by RBOCs such as QC under Section 271(c)(2)(B) of the 1996 Act. Thus the unbundling obligation is federal, as is the jurisdiction to review the contracts for these elements. 2) The elements remain subject to federal jurisdiction even after they have been removed from the list of Section 251(c)(3) "unbundled network elements." The FCC does not lose its jurisdiction over network elements simply because the impairment test is not met. 3) Some of the elements (*e.g.*, line sharing used for DSL services) are jurisdictionally interstate and not subject to state jurisdiction in any event.

First, in the case of QC (and other RBOCs), there is an independent investiture of federal jurisdiction under the 1996 Act. Many of the elements which have been removed from the list of unbundled elements must still be unbundled pursuant to Section 271(c)(2)(B) of the 1996 Act.[24] The offering of the switching element, for example, on an unbundled basis pursuant to Section 271(c)(2)(B)(vi) is subject to federal jurisdiction.[25] The filing and review (if any) of contracts entered into pursuant to Section 271(c)(2)(B) of the 1996 Act is a federal matter which has not been delegated to the states.[26]

Second, network elements made available under the 1996 Act are subject to the jurisdiction of the FCC (subject to specific exceptions).[27] The FCC's jurisdiction is not diminished whenever such a network element is removed from the FCC's list of unbundled elements.[28] What this jurisdictional structure means is that a valid federal policy (in this case the policy favoring market agreements for network elements that have not met the impairment test) is presumptively preemptive of inconsistent state regulations because the federal nature of the service/facility under the 1996 Act automatically brings them into the zone of federal jurisdiction.[29] State filing and review requirements are not permissible because they are inconsistent with this preemptive federal policy. The mere fact that the FCC's action in this regard is deregulatory, not regulatory,

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[24] *Triennial Review Order*, 18 FCC Rcd. at 17383-84 ¶ 652.

[25] The FCC, in the *Triennial Review Order*, confirmed this jurisdiction, noting that it would enforce compliance with Section 271 offerings (*id.* at 17385-86 ¶ 655) and that it would apply Sections 201 and 202 of the Act to such offerings (*id.* at 17389 ¶ 663).

[26] Of course, state jurisdiction over Section 271 issues is considerably more limited than is the case with Section 251, and is advisory only. *See* 47 U.S.C. § 271(d)(2)(B).

[27] *See Triennial Review Order*, 18 FCC Rcd. at 17100-01 ¶¶ 194-95; *USTA II*, 359 F.3d at 594.

[28] *AT&T Corporation v. Iowa Utilities Board*, 525 U.S. 366, 385 (1999): "Congress has broadly extended its law into the field of intrastate telecommunications, but in a few specified areas (ratemaking, interconnection agreements, etc.) has left the policy implications of that extension to be determined by state commissions. . ."

[29] In other words, the contrary presumption for services assigned to the intrastate jurisdiction by Section 2(b) of the Act does not apply because federal jurisdiction is established *a priori. See California v. FCC,* 798 F.2d 1515, 1520 (D.C. Cir. 1986). The landmark case for the premise that the Commission's jurisdiction to preempt on policy grounds is limited to where it has federal jurisdiction in the first place is *Louisiana Public Service Commission v. FCC,* 476 U.S. 355 (1986). This limitation does not apply to facilities and services committed to the federal jurisdiction under the 1996 Act.

is irrelevant, because deregulatory action by the FCC (*e.g.*, removing a network element from the list of elements that must be unbundled pursuant to the "impairment test") does not reduce either the federal jurisdiction pursuant to which the deregulation was accomplished or the FCC's ability to preempt inconsistent state regulations.[30] Likewise, a reviewing court's vacation and remand of an FCC unbundling rule does not reduce the FCC's jurisdiction over that element. In *USTA II*, for example, the D.C. Circuit clearly expects the FCC, rather than the states, to determine the unbundling obligations, if any, applicable to the network elements that are the subject of the court's vacation and remand.

Finally, some network elements, such as line sharing, are used almost exclusively for the provision of services that themselves fall within the federal jurisdiction because they are interstate in nature. Line sharing (leasing the high frequency portion of a copper loop to a CLEC which uses this frequency for the provision of DSL service) is within the federal jurisdiction because DSL service is a service that itself is jurisdictionally interstate irrespective of any provisions of the 1996 Act.[31] Because states do not have jurisdiction over interstate DSL service, they do not have jurisdiction over agreements between ILECs and CLECs to offer the network elements used to provide DSL service.

Accordingly, states have no regulatory jurisdiction over those network elements that do not meet the impairment test (and have been declared as such by either the FCC or a court of competent jurisdiction). The delegations of authority found in Sections 251(d)(3) and 261(b) and (c) of the Act do not operate to grant or reverse such authority to state regulators.

IV. THE FCC HAS THE AUTHORITY UNDER SECTION 211(a) OF THE ACT TO REQUIRE THE FILING OF AGREEMENTS FOR NETWORK ELEMENTS THAT DO NOT MEET THE STATUORY "IMPAIRMENT TEST."

Contracts between carriers for network elements that do not meet the "impairment test" also fall within express federal filing jurisdiction. That is, the FCC has the authority to require that all such contracts be filed with the agency and to enforce the Communications Act's Section 202(a) non-discrimination requirements with regard to them. As a matter of rule the FCC has exempted non-dominant carriers from the federal filing obligations applicable to such contracts.[32] No such exemption exists for contracts between ILECs (which are subject to dominant carrier regulation) and CLECs. Furthermore, unlike access services, the Commission has not directed the ILECs to

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30 *See Computer and Communications Industry Association v. FCC*, 693 F.2d 198, 217 (D.C. Cir. 1982), *cert. denied sub nom. Louisiana Pub Serv Comm'n v. FCC*, 461 U.S. 938 (1983).

31 *In the Matter of GTE Telephone Operating Cos.*, *GTOC Tariff No. 1, GTOC Transmittal No. 1148, Memorandum Opinion and Order*, 13 FCC Rcd. 22466, 22474-75 ¶ 16 (1998), *recon. denied*, 17 FCC Rcd. 27409 (1999).

32 *See In the Matter of Amendment of Sections 43.51, 43.52, 043.53, 43.54 and 43.74 of the Commission's Rules To Eliminate Certain Reporting Requirements*, *Report and Order*, 1 FCC Rcd. 933 (1986).

provide these network elements as tariffed offerings. These contracts therefore must be filed with the FCC, but are not subject to prior FCC approval. Concomitantly, states have no authority to duplicate this federal filing requirement (beyond reviewing such contracts for informational purposes only).

Section 211(a) of the Communications Act requires that:

> Every carrier subject to this [Act] shall file with the Commission copies of all contracts, agreements, or arrangements with other carriers, or with common carriers not subject to the provisions of this chapter, in relation to any traffic affected by the provisions of this chapter to which it may be a party.[33]

This statutory language provides an affirmative grant of power to carriers to order their affairs with other carriers by way of contract unless the FCC's rules (or other provisions of the Communications Act) provide otherwise, even when the same business relationship with an end-user customer would need to be dealt with in a tariff.[34] It stands for the legal proposition that Qwest may enter into commercial negotiations with CLECs for the sale of network elements not subject to Sections 251(b) or (c), and may enter into binding agreements with those CLECs for the sale of those network elements (even though untariffed sales to end-user customers would generally not be lawful). The general prohibition against "unreasonable discrimination" applies to such contracts.[35] Carriers may, of course, purchase services from the tariffs of another carrier or choose to tariff their inter-carrier offerings -- Section 211(a) provides carriers a choice in those instances where the FCC has not acted to actually require either a contract (unbundled network elements) or a tariff (exchange access). In point of fact, the current structure whereby interexchange carriers purchase access to local exchange carrier facilities and services pursuant to tariff is of relatively recent origin,[36] and the access tariff regime replaced a system governed largely by inter-carrier contracts and partnerships.[37]

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33 This statutory provision is implemented in Section 43.51 of the Commission's rules. Non-dominant carriers are exempt from the filing requirements of this section. *See* note 32 *supra.*

34 *Bell Telephone of Pennsylvania v. FCC*, 503 F.2d 1250, 1277 (3d Cir. 1974). *See also In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace*, *Implementation of Section 254(g) of the Communications Act of 1934, as amended*, *Notice of Proposed Rulemaking*, 11 FCC Rcd. 7141, 7190 ¶ 97 (1996); *In the Matter of the Applications of American Mobile Satellite Corporation*, *Order and Authorization*, 7 FCC Rcd. 942, 945 ¶ 15 (1992); *In the Matter of Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefor*, *Notice of Proposed Rulemaking*, 84 FCC 2d 445, 481 ¶ 95 (1981).

35 *MCI Telecommunications Corp. v. FCC*, 842 F.2d 1296 (D.C. Cir. 1988).

36 *See In the Matter of MTS and WATS Market Structure*, *Second Supplemental Notice of Inquiry and Proposed Rulemaking*, 77 FCC 2d 224, 226-31 ¶¶ 12-35 (1980).

37 *See In the Matter of MTS and WATS Market Structure, Third Report and Order*, 93 FCC 2d 241, 246 ¶ 11, 254 ¶ 39, 256-60 ¶¶ 42-55 (1983).

These statutory federal filing requirements are important because they show a federal regulatory regime (already in place) that deals with the precise issue (filing of contracts for interconnection services not covered by Sections 251(b) or (c)) that conflicts directly with state filing requirements applicable to those same agreements. State filing requirements, thus, would not simply contradict the federal jurisdiction over the network elements covered by the agreements; they would traduce a federal regulatory structure that is already in place.

V. CONCLUSION

Agreements between QC and CLECs for network elements that are not covered by Sections 251(b) or (c) do not need to be filed with state regulatory authorities, nor can states demand the right to review such agreements. The agreements are instead subject to federal law and to the federal filing requirements of Section 211(a). The filing requirements in the 1996 Act itself (Sections 252(a) and (e)) do not apply to such agreements because they are not "interconnection agreements" as that term has been defined by the FCC for filing purposes. Other statutory delegations to the states (either under the general reservation provisions of Section 2(b) or the specific delegation provisions of Sections 261(b) and (c) and 251(d)(3)) do not cover the filing of these agreements. What is more, the FCC's interest in preserving the ability of the marketplace to govern the negotiation and implementation of these agreements would be subject to significant interference if state regulators were to successfully assert the jurisdiction to review these agreements.

To the extent necessary to clear up any confusion in this area, it is incumbent on the FCC to take appropriate action to preserve the federal jurisdiction and its own authority over these agreements.

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST CORPORATION** to be 1) filed with the FCC via its Electronic Comment Filing System in WC Docket No. 04-245, 2) served, via e-mail on Ms. Janice M. Myles of the Wireline Competition Bureau, Competition Policy Division at janice.myles@fcc.gov, 3) served, via e-mail on Best Copy and Printing, Inc. at www.bcpiweb.com., and 4) served, via First Class United States mail, postage prepaid, on the party listed on the attached service list.

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July 30, 2004

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